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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No.

COUNTY BOARD OF EDUCATION OF
RICHMOND COUNTY, GEORGIA, ET AL.,
Petitioners

versus

ROBERT L. ACREE, ET AL.,
Respondents

versus

ANN GUNTER DRUMMOND, ET AL.,
Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI

INDEX

Page

TO PETITION

I. Opinions Below 2

II. Jurisdiction 2

III. Questions Presented 2

IV. Statement 3

V. Reasons for Granting This Writ..... 5

VI. Conclusion 17

TO APPENDIX

I. Order of District Court.....A-1

II. Opinion of Fifth Circuit.....A-34

III. Denial of Motion for Rehearing.....A-39

TABLE OF CASES

Acree v County Board of Education of Richmond County, et al., 458 F.2d 486 .....2, A-34

Swann v Charlotte-Mecklenburg County, etc., 402 U.S. 1; 91 S Ct. 1267; 39 Law Week 4437.....2, 5

Winston-Salem/Forsyth Board of Education v Scott, et al 404 U.S. 1221; 92 S.Ct. 1236.....5, 8

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PETITION FOR CERTIORARI

The Petitioners, County Board of Education of Richmond County, Georgia, respectfully pray that a writ of certiorari issue to review the judgment and opinion

of the United States Court of Appeals for the Fifth Circuit entered March 31, 1972; rehearing denied April 18, 1972 (Appendix B. p. A-39).

OPINIONS BELOW

The basic decision involved here is that of the United States Court of Appeals for the Fifth Circuit, 458 F.2d 486 (Appendix B, p. A-34). The District Court established and approved a plan for the desegregation of the County School System insofar as the elementary schools were concerned. At the time of the decision which is here complained of, no plan for desegregation of the secondary schools had been adopted by the District Court (Appendix A. p. A-1). The District Court had been ordered on July 1, 1971 to put into effect a plan that compiled with the principles established in *Swann v Charlotte-Mecklenburg County, etc.*, 402 U.S. 1; 91 S Ct. 1267; 39 Law Week 4437. All parties appealed from the decision of the District Court, each relying on an interpretation of *Swann*. The Fifth Circuit affirmed and remanded the case to the District Court on the basis of its interpretation of the requirements of *Swann*.

JURISDICTION

The jurisdiction of this court is invoked under 28 USCA Sec. 1254 (1).

QUESTIONS PRESENTED

A. Whether the Fifth Circuit has correctly interpreted the intent of this Court as set out in *Swann*?

B. Whether the Fifth Circuit has correctly interpreted that portion of *Swann* which states as follows:

> "An objection to transportation of students may have vitality when the time or distance of travel is so great as to risk either the health of the children or significantly impinge on the educational process... It hardly needs stating that the limits on time of travel will vary with many factors, but probably with none more than the age of the students."

C. Whether the Fifth Circuit has erred in affirming a partial plan of desegregation affecting only elementary schools insofar, as it could not be determined at the time of the decision whether the elementary plan when combined with the secondary plan would be constitutional.

D. Whether the present elementary school plan should be reversed and remanded insofar as the present elementary plan is administratively and financially impossible to perform and does not meet the guidelines laid down in the *Swann* decision.

STATEMENT

This case has been in the courts since 1964 at which time a freedom of choice plan

was in effect in Richmond County, Georgia.

Subsequent to 1964, the plan has been refined and modified several times. The issue in question before this court is a result of the Order of January 13, 1972 of the District Court (Appendix A, p. A-1) and the last decision of the Fifth Circuit (Appendix B, p. A-34) in which the decision of the District Court was affirmed and remanded.

Petitioner believes that the Fifth Circuit has misconstrued the intent of *Swann* and that their decision oversteps the bounds of latitude and guidelines presented in *Swann*. This is the thrust of this petition.

REASONS FOR GRANTING THIS WRIT

The granting of the writ of certiorari offers this court an opportunity to (1) refine its decision in the case of *Swann v Charlotte-Mecklenburg Board of Education*, 402 U.S. 1; 91 S.Ct. 1267; 39 Law Week 4437; (2) to determine the limits and requirements set by *Swann* relating to the distances of bussing allowed; (3) to determine and define when the transportation of students significantly impinges on the educational process; (4) to determine the limits to which bussing may be constitutionally used as a tool of desegregation if other workable tools of desegregation are available to the court; (5) to refine the decision in the case of *Winston-Salem/ Forsyth County Board of Education v Scott, et al* 404 U.S. 1221; 92 S.Ct. 1236

The petitioner contended on appeal before the Fifth Circuit that its school system meets constitutional standards. Petitioner further contended that *Swann* did not require extensive transportation of students as proposed by the District Court. Therefore, to decide the basic legal issue presented by this petition, it must be determined whether the Fifth Circuit has misconstrued the intent of this Court in *Swann*, an important Federal Question within the meaning of Rule 19 (1) (b). Furthermore, there is an overwhelming necessity to determine and define exactly when the transportation of students impairs the health and welfare of such students and

significantly impinges on the educational process.

It is the belief of Petitioner that the transportation and bussing plan imposed upon Richmond County, Georgia, when measured by any standard of comparsion, is more severe than the plan approved by the Court in *Swann*.

In *Swann*, it was determined that court ordered transportation compared favorably with the transportation plan that had previously been operated in the Charlotte-Mecklenburg School System whereby students were "transported an average of 15 miles one way for an average trip requiring over an hour". There court ordered transportation averaged about seven miles and would take "not over 35 minutes at the most." Accordingly, both transportation times and distances in Charlotte-Mecklenburg County actually decreased with implementation of court ordered desegregation. Such is not the situation in Richmond County, Georgia.

Prior to the implementation of the order of the District Court, bus routes in Richmond County were of reasonable distances and travel times. Rural school district routes were somewhat longer, but took less time to travel because of open roads and an absence of traffic congestion. The rural school districts are not affected by the Court's order as they already meet Constitutional Standards.

With the implementation of Phase III in September, bus routes will increase significantly both in distance and time of travel.

For example, Zone H of Phase III involves three elementary schools which have been clustered and paired. Garrett (grades 3-5) and National Hills (grades 1-2) are located in a surburban area. Floyd (grades 6-7) is located in the center of Augusta. The distance of travel between Floyd and Garrett is 6.4 miles each way. This distance *does not* take into consideration the actual bus route that must be followed to allow all of the students to be picked up and delivered to school. The total round trip along the actual route will be somewhat more than 12.8 miles.

In addition to the distances stated immediately above, the bus routes would have to be made through congested downtown traffic and intersections which would add considerable travel time to each trip. There are no freeways or interstate highways as were available in Charlotte upon which the students could be transported to shorten travel time.

Another similar example of the severity of the court-ordered transportation plan is Zone B of Phase III. This Zone involves the clustering and pairing of four elementary schools. Walker (grades 5-7), Lamar (grades 1-3), Monte Sano (grades 3-4) and Lake Forest Drive (grades 1-2). Lake Forest Drive School is located in a surburban

area while Walker is located in the center of Augusta. The distance of travel between Lake Forest Drive and Walker is 5.9 miles each way (round trip 11.8 miles). This *does not* take into consideration the actual bus route which in this instance will be considerably longer because of pick-up requirements.

Again, as in the previous example, bus routes of necessity will be through congested downtown traffic and intersections which will add considerable travel time.

All of the bus routes explained above will be much longer than any previously operated under the old transportation system. Many of the students affected by the order of the District Court had not previously been transported.

The two examples above explained are not peculiar. All of the Zones pose similar severe problems.

The bus routes illustrated above will each take an average daily travel time of approximately two hours. Although all bus route distances and travel times have not yet been computed, the examples above cited are sufficient in and of themselves to allow this Court to determine whether the circumstances in Richmond County, Georgia, are patently offensive to constitutional standards as school facilities are available at lesser distances. *Winston-Salem/ Forsyth County Board of Education v Scott et al.* 404 U.S. 1221; 92 S.Ct. 1236.

The above examples also present the legitimate questions as to whether the limits of *Swann* have been misconstrued and misapplied in our case. This is patently clear in considering the length of time involved, the length of the bus routes, the fact that the bus routes are through heavy traffic and the fact that the students involved in this massive transportation are the youngest children in the school system.

Similarly, this Court in *Swann* held that "the constitutional command to desegregate schools does not mean that every community must always reflect the racial composition of the school system as a whole." Yet in the affected elementary schools in Richmond County, Georgia, that is exactly what has happened.

The racial composition of students in Richmond County is approximately 60% white and 40% black. Under Plan III, adopted by the District Court for the elementary schools, however, this ratio is expressly fixed. The ratios of black students in each of these schools are as follows:

Zone A	40.8%
Zone B	46.1%
Zone C	44.4%
Zone D	43.7%
Zone E	44.0%
Zone F	30.2%
Zone G	38.8%

Zone H	43.1%
Zone I	40.1%

It thus is clear that the plan as approved contains an almost exact ratio of black to white students in almost every instance. This result was not intended by *Swann* and thus, this case gives the Court a chance to clarify its meaning in *Swann*.

With each example given, the severity and unreasonableness of the plan, as adopted, becomes clearer. To illustrate this point, it is necessary only to demonstrate the transportation statistics including costs. The desegregation plan was to be implemented in three phases and therefore for convenience the statistics are broken down into phases.

Phase I

Two thousand, two hundred thirty-one students were ordered transported under this phase of the plan. To implement the actual transportation, it was necessary to add 15 additional buses and drivers. Also six shop personnel were added to enable the school board to implement Phase I.

The Director of Transportation had estimated it would take 14 additional buses to handle Phase I and his estimate was almost entirely accurate.

Furthermore, the implementation of Phase I added 67,000 additional bus miles from February 15, 1972 (the day of implementation) through the end of May 1972, a period of only three and one-half months.

The increased operating costs, for three and one-half months, not including the cost of buses, was $38,500.00 for Phase I.

Phase II

One thousand and forty-four students were ordered transported under this phase of the plan. To implement the actual transportation, it was necessary to add 13 additional buses and drivers. It had been estimated that only seven additional buses would be needed for this phase of implementation, but the Director of Transportation, had severely underestimated the actual needs.

Furthermore, the implementation of Phase II added 38,010 additional bus miles from March 15, 1972 (the day of implementation) through the end of May, 1972, a period of only two and one-half months.

The increased operating costs for these two and one-half months was $38,500.00, excluding the cost of additional buses.

Phase III

Phase III is by far the largest of the phases that are to be implemented in the elementary schools as a result of the Court order. It is to be implemented with the beginning of the school term, 1972. Six thousand and twenty-three students will be transported under this phase of the plan.

To implement the actual transportation, it will be necessary to add 42 buses and drivers.

Furthermore, the implementation of Phase III, will add 380,100 additional transportation miles over a nine month period.

The increased operating costs added by Phase III for the coming school term will be $218,420.00, not including the cost of additional buses.

Although Phase III, is based on estimates, it is noted that all estimates have been proven accurate by actual experience in Phases I and II, with any miscalculations resulting in under-estimates rather than overestimates.

Phases I, II and III Combined

The combined increased operating costs, not including the purchase of new school buses, is $278,920.00.

If the schools are to operate on a normal opening time schedule, the total costs of new buses needed for all three phases is $787,500.00 (Phase I, $175,000.00; Phase II, $87,500.00; Phase III, $525,000.00).

This cost is incomprehensible when one considers that the entire transportation budget for the 1971-72 school term was $617,000.00. The transportation budget for the coming school year is $905,000.00, almost a 50 per cent increase. This figure, however, barely provides sufficient funds to cover the added operation costs of $278,920.00.

Although the school board has been and is making attempts to obtain additional funds, it has been unable to do so.

If the schools in the system operate on a regular basis with all schools in the system opening at the same time, the cost of new buses needed to implement the integration plans will be $787,500.00. If the schools operate on a staggered opening schedule, the total cost of new buses needed for implementation of this plan will $525,000.00.

If school hours were staggered, however, the results would be disasterous to the students and violate the principles laid down in *Swann*.

The school hours, however, will have to be staggered if some assistance and relief is not given the school system because the school system simply does have the funds or means available to purchase the buses that the new plan would require. All of this is unnecessary in the light of the fact that there are other methods of desegregation that would

accomplish the constitutional results required yet still leave room for a reasonable desegregation plan that provided for and allowed quality education.

The following hours would be those in operation if staggering the opening hours of school occurred.

	Take In	Let Out
High School	7:30 a.m.	2:15 p.m.
Junior High	8:30 a.m.	3:15 p.m.
Upper Elementary	9:30 a.m.	4:15 p.m.
Primary Elementary	9:30 a.m.	4:15 p.m.

It is obvious that the staggering of opening hours would create overwhelming problems for the students, their parents and the Board of Education. Yet, if the elementary plan is implemented, the board would have no alternative but to stagger the hours and to stagger them at least to the extent stated above. Some students would have to board their school bus by 6:30 a.m., while others would not arrive home until 5:30 p.m. Additionally, parents of more than one child in school may have as much as a three hour lapse between the time a bus picked up their first child and their last. There may also be a difference of two hours in the times the children arrived home from school.

Petitioner can find nothing in the constitutional requirements that would envision nor require such hardships. Such a result as envisioned by this plan would without doubt affect the health and welfare of the students involved and would very significantly impinge on the educational process.

One other undesirable feature of the adopted plan is that under it students must attend a multitude of schools to be eligible for graduation. Under the old system, a child attended a minimum of three schools (elementary, junior high and high). Under the present plan, elementary school children alone will have to attend a minimum of three elementary schools with many attending a minimum of four elementary schools. Under Zones A and B of the elementary plan, each student in these Zones will attend a minimum of four elementary schools. No stability for either the student, teachers or administration of educational programs is allowed.

Had the secondary schools been clustered and paired, the results would be even more disastrous because a secondary clustering plan would have required that a student attend a minimum of seven or eight schools before earning a degree. Fortunately, the secondary plan approved by the District Court does not have many of the constitutional infirmities and drawbacks found in the present elementary plan. It is for this reason that other methods should be examined to determine

whether the desegregation plan for the elementary level could be returned to a somewhat more reasonable basis.

Last, this Court should consider the purpose of the "Education Amendments of 1972 Act" recently passed by Congress, paying attention to Title VIII - GENERAL PROVISIONS RELATING TO THE ASSIGNMENT OR TRANSPORTATION OF STUDENTS, with particular emphasis being focused on Sections 801 and 804 of said Act. The purpose, intent and spirit of this Act is to prevent the desegregation of schools in a manner which would risk the health of students or significantly impinge on the educational process. The Act also prevents the assignment or transportation of students in order to overcome racial imbalance. In other words, the Act seeks to prevent the exact results presently prevailing in the elementary schools in Richmond County.

CONCLUSION

This case is of paramount public importance. The elementary plan ordered into effect is severe and goes beyond what petitioner contends to be the limits of *Swann*.

The questions presented in this petition will, if favorably decided, enable not only this school system, but other school systems under court order to rapidly implement desegregation plans with clear cut constitutional standards that define

specifically the limits on the use of transportation of students for the purpose of achieving racial balance; define when the use of transportation as a means of desegregation has a detrimental effect upon the health and welfare of the students; define when the use of transportation as a tool of desegregation would significantly impinge upon the educational process; and, would present guidelines that would allow increased use of more reasonable methods of desegregation.

It is the desire of this school board to be able to operate under a constitutional plan that is reasonable and which preserves quality education for all students and it is in the public interest that definite guidelines be set in this case by this Court.

Respectively submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have on the day below written served counsel for respondents with the within and foregoing Petition for Writ of Certiorari by placing in the United States Mail three copies of same in a properly addressed envelope with adequate postage thereon addressed to J. H. Ruffin, 1101 Eleventh Street, Augusta, Georgia, 30902, and O. Torbitt Ivey, Jr., Suite 500, The 500 Building, Augusta, Georgia, 30902.

This 14 day of July, 1972.

FRANKLIN H. PIERCE
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Augusta, Georgia

LEONARD O. FLETCHER, JR.
McGAHEE, PLUNKETT, BENNING
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APPENDIX A

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

No. 1179

ROBERT L. ACREE, ET AL.,
Plaintiffs

versus

ANN GUNTER DRUMMOND, ET AL.,
Plaintiffs in Intervention

versus

COUNTY BOARD OF EDUCATION OF RICHMOND COUNTY, GEORGIA, ET AL.,
Defendants

Order from the United States District Court for the Southern District of Georgia

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(January 13, 1972)

Before Judge LAWRENCE

This case has been around since 1964. I came into it in the Fall of 1968. At that time a freedom of choice plan was in effect in Richmond County Schools. The total enrollment of white and black children in 1967-1968 was approximately 35,750 students. Of 12,250 Negro students in the school population 5.5% chose to attend previously all-white schools. With one exception no white student has exercised freedom of choice to attend a previously all-black school.

Judge Scarlett held hearings in the Spring of 1968 on a motion by plaintiffs to adjudge the School Board in contempt and for summary judgment. He denied such relief. On appeal the Fifth Circuit reversed that ruling. See 399 F.2d 151. The appellate court said:

> "...we think it quite appropriate to point to the fact on the undisputed statistics presented to us it is clear that, with respect to the Richmond County Board of Education, a plan of desegregating the schools, generally known as 'the freedom of choice' plan has not worked. It has not produced a unitary school system in which there are no longer Negro schools and white schools, generally known and recognized by all of such. Under these circumstances, it becomes the duty of the respondent Board, not only under the Supreme court decisions above referred to, but under our Jefferson decree, to take additional important and effective steps."

(fol. 2) After the ruling was handed down the Fifth Circuit Court of Appeals assigned the case to me. A hearing was held at Augusta

in December, 1968. I said that freedom of choice was impermissible. It had not worked. The Supreme Court had made this clear in Green v. County School Board of New Kent County, 391 U.S. 430; 88 S.Ct. 1689, 20 L.3d.2d 716 where the highest Court ruled that freedom of choice must be an effective device promising "meaningful and immediate pogress toward disestablishing state-imposed segregation." The Court said that "The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work now."

I did not rule out freedom of choice altogether but stated that I would "give consideration to a plan formulated by the Board which combines automatic assignment of pupils within designated geographical zones and a limited freedom of choice of schools." See Acree v. County Board of Education of Richmond County, Georgia, 294 F. Supp. 1034. I directed that a zone or attendance area system be put into effect for the 1969-1970 school year.

On June 16, 1969, a hearing on the Board's plan was held at Augusta. Plaintiffs objected to it in toto. On July 14, 1969, I approved the plan presented as a temporary expedient. See 301 F. Supp. 1285. I pointed out:

> "The decisions of the Court of Appeals for the Fifth Circuit say that geographic zones are acceptable only if they tend to disestablish rather than reinforce the dual system of segregated schools. Davis v. Board of School Commissioners of Mobile County, 393 F.2d 690; United States

of America v. Greenwood Municipal Separate School District, 406 F.2d 1086 (Feb. 4, 1969); Henry v. Clarksdale Municipal Separate School District 409 F. 2d 682. A school board must strive for promotion of desegregation and 'conscious effort should be made to move boundary lines and change feeder patterns which tend to preserve segregation.' See 393 F.2d at 694."

I further stated:

"I think the wisest thing to do at this time, certainly the most expedient, is to approve temporarily the Board's new zone system and permit same to go into effect at the beginning of the coming (1969-70) school year. We will soon thereafter be able to judge its effects. Because of possible constitutional informities of the zoning plan it will not be permanent and this is not a final order."

My Order of July 16, 1969, directed the School Board and Superintendent to apply immediately to the Office of Education, H.E.W., for professional counselling and assistance looking to development of a satisfactory and legal plan at an early date.

(fol. 3) Before such a plan could be developed and presented the plaintiffs filed an appeal to the Court of Appeals for the Fifth Circuit. This was in March, 1970. On July 1st of that year that Court remanded the case. See 443 F.2d 1360. The higher Court said:

"Having examined the record and the briefs of counsel in the above styled

and numbered cause, this Court is left with a very definite and indelible impression - the Richmond County, Georgia public schools are racial identifiable, both as to the faculty and the composition of the respective student bodies. If there is any hope remaining for the Richmond County public schools to operate as a unitary system by the commencement of the new school year - prompt and immediate action is required."

In compliance with the Order by the Fifth Circuit a hearing was held and evidence introduced on July 30, 1970. On August 3rd I approved a plan recommended by Health, Education and Welfare which I modified to include additional pairing. It was essentially a neighborhood plan. The Fifth Circuit had gone along with something similar in the case of Ellis v. Board of Public Instruction of Orange County, Florida, 423 F.2d 203. I took that route. The plan in question was to be implemented at the 1970-1971 school year.

My Order of August 3, 1970, in the Acree case was appealed to the Fifth Circuit. Meanwhile, the "busing" and racial ratio cases, including Swann v. Charlotte-Mecklenburg Board of Education had reached the Supreme Court of the United States. The Court of Appeals held its ruling in abeyance pending a decision in Swann and the other cases. It was handed down by the Supreme Court on April 20, 1971. See 402 U.S. 1-48. That decision made it clear (I quote the syllabus in Swann) that:

(a) While the existence of a small number of one-race, or virtually one-

race schools does not in itself denote a system that still practices segregation by law, the court should scrutinize such schools and require the school authorities to satisfy the court that the racial composition does not result from present or past discriminatory action on their part.[1]

(b) A student assignment plan is not acceptable merely because it appears to be neutral, for such a plan may fail to counteract the continuing effects of past school segregation. The pairing and grouping of noncontiguous zones is a permissible tool.

(fol. 4) (c) The District Court's conclusion that assignment of children to the school nearest their home serving their grade would not effectively dismantle the dual school system is supported by the record, and the remedial technique of requiring bus transportation as a tool of school desegregation was within that court's power to provide equitable relief.

On July 1, 1971, the Court of Appeals for this Circuit disapproved the plan which this Court had approved in July, 1970, to be put into effect during the

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1. The Fifth Circuit has been telling us for years that "if in a school district there are still all-Negro schools or only a small fraction of Negroes enrolled in white schools ... then as a matter of law the existing plan fails to meet constitutional standards established in Green." Adams v. Mathews, 403 F.2d 181.

current school year. It remanded the case, stating:

"The judgment of the district court as it relates to student and faculty assignment is vacated and the case is remanded with direction that the district court require the school board forthwith to constitute and implement a student and faculty assignment plan that complies with the principles established in Swann v. Charlotte-Mecklenburg Board of Education, 1971, ___ U.S. ___, ___ S.Ct. ___ 1.Ed.2d ___, 39 Law Week 4437; Carter v. West Feliciana Parish School Board, 5 Cir., 1970, 432 F.2d 875, and Singleton v. Jackson Municipal Separate School District, 5 Cir., 1970, 419 F.2d 1211, insofar as they relate to the issues presented in this case."

The Court of Appeals has said that the prevailing system is a dual and an unconstitutional one. The racial statistics bear this out beyond all doubt. They reveal that in the elementary schools during the 1970-1971 year seventeen were predominantly white and nine predominantly black.[2] There were four all-black elementary schools and one all-white. In eleven elementary schools the minority attendance was 5% or less of the whole and in three other schools the minority ratio was 10% or less of the entire school

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2. I have used an 85% ratio as illustrating a predominantly white or predominantly black school.

population.[3] On the secondary school level in 1970-1971, out of seventeen schools there was one all-black and two 99% black schools. There were six predominantly white schools in which the Negro ratio was less than 10% and two predominantly black schools with an attendance by white students of 6% or less. Two other secondary schools had a white ratio of 88% of the school population.

The current school year has produced inevitably (since the same plan is in effect) the same segregated picture. The projected attendance indicated that there are forty-one schools in which white students predominate. They have a total enrollment of 24,721 of whom 20,648 are white and 4,073 are black. In eighteen black schools in the system which have a total enrollment of 12,941 there are 360 white students (2.8%).

(fol. 5) Following the decision of the Circuit Court of Appeals on July 1, 1971, I promptly ordered the Board to present a student and faculty assignment plan to this Court not later than July 21, 1971. I assigned a hearing on it for July 28th. Subsequently, upon oral request I extended to August 26th the time for presentation of such a plan. A hearing was held on that date.

To my amazement, the H.E.W. officials did not show up at the August 26, 1971,

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3. For example, at Southside this year, there are 680 students of whom 8 are black.

hearing. Without notice or excuse and at whose behest I do not know they did a disappearing act. The Board's behavior was no less contemptible. They passed the buck to the Superintendent of Schools, who, no doubt under instructions, presented a "plan" to the Court on behalf of the Board. What that individual did recommend does not surprise me in the light of his statement to this Court at the hearing held in Augusta on December 16, 1971. I inquired of him what plan he would suggest to the Court for the integration of the school system and his reply was, "Freedom of Choice." The plan presented by the School Superintendent at the "hearing" on August 26th last was to keep the school zones as they were except for two or three minor changes as to boundaries. One of them would have transferred about 100 white students to an all-black high school. This plan, so learned counsel for the Board informed me, made the system a unitary one, if it was not already such.

In Acree v. County Board of Education of Richmond County, 399 F.2d 151, the Court of Appeals said: "We think it not necessary to do more than call the attention of the respondent here to the extremely important obligation which is once more placed on the Board to assume its full responsibility to do all that is reasonably feasible, and now, to bring an end to the dual system of white and Negro schools in Richmond County." The Richmond County Board and its Superintendent have abdicated their responsibility. They have been contemptuous and intransigent. They have chosen to ignore the Constitution and the courts. Apparently, they, together with a segment of the population

of Richmond County, deem themselves above and beyond the law. The Fourteenth Amendment is not to apply to those who find it not to their liking.

At the conclusion of the August hearing I stated that this Court would employ its own experts at the Board's expense to do what it and the school officials refused to do in the way of devising a plan of desegregation. Five days later the Court obtained the services of two well-known educators, experienced in desegregation planning, Dr. J. Howard Munzer and Myrl G. Herman of the faculty of Rhode Island College.

(fol. 6) Alternative plans were presented in the Munzer-Herman suggestions which were filed in this Court on September 27, 1971. The several Plans do not set out to establish any set numerical ratio of blacks to whites. However, through clustering and pairing it achieves a not dissimilar result.

Four elementary school plans are proposed. Plan I involves an unacceptable minimum amount of integration. Plan II involves more desegragation and Plan III (which I am adopting) even more. Plan IV would provide for maximum desegregation embraced and involved all but two elementary schools.

Two plans were presented for desegregation of the secondary schools. The plan is the same for the following schools: Josey, Murphey, Butler, Tutt, Langord, Richmond Academy and Laney. Under both Plan I and Plan II at the secondary level the schools mentioned would house the following grades.

Josey - Grades 8-9
Murphey - Grade 10
Butler - Grades 11-12
Tutt - Grades 8-9
Langford - Grades 8-9
Richmond Academy - Grades 11-12
Laney - Grade 10

In both Plan I and Plan II Tubman will house grade 8 and Johnson grade 9. However, under Plan I Tubman would have 511 students, 50% black, and Johnson would have 492 students, 45% black, whereas under Plan II Tubman has 461 students, 45% black, and Johnson has 442 students, 39% black. The basic difference in the two secondary school Plans is that Plan I does not involve Sandbar Ferry or Sego whereas under Plan II these two schools are paired in such a way that Sandbar Ferry is grade 8 and Sego is grade 9.

After the plans were filed, I asked the parties for their analysis, comments and criticisms. The plaintiffs complained, among other things, that presently all-black Laney and Josey were reduced in status from graduating high schools and that this was not done in the case of any predominantly white senior high school.

The Board's response was of expected quality and content. It raises every carping, contumacious objection conceivable. It is a mishmash and embranglement of letters from individual members of the Board, the Superintendent and principals opposing desegregation of the system. There are resolutions, letters, speeches, newspaper clippings, et cetera. The response contributes less than nothing to the difficult problem the Board faced but fled.

(fol. 7) Meanwhile, in October, 1971, I permitted a group of white parents to intervene who are opposed to busing though they say they are not opposed to integration per se. I will add that if there is any way to dismantle a dual school system, and the Richmond County Board perpetuated one long after the 1954 decision in Brown v. Board of Education, 347 U.S. 483, I am not aware how the constitutional imperative can ever be achieved without substantially increasing the transportation of students.

At my suggestion, the Intevenors presented a plan for consideration. It is entitled "Quality Education Plan for the People of Richmond County, Georgia." The plan is nothing more than Freedom of Choice both for students and faculty. Since the Intervenors have a right of appeal from this Order the higher court can enlighten us as to my evaluation of the "plan" proposed. Anyone who has even casually examined the decisions of the United States Supreme Court and of the Court of Appeals for this Circuit must know that choice plans are not constitutionally acceptable in a case such as this. In fact, the latter Court said exactly as much concerning the Richmond County system. See 399 F.2d 152.

On October 8, 1971, Dr.Munzer and Mr. Herman returned to Augusta to confer with the Court concerning the proposed desegregation plans. On the same day, with counsel and the Superintendent of Schools present, the plans were explained and discussed by the experts in the courtroom.

A full evidentiary hearing was held on

December 16-17, for the purpose of considering a plan and for hearing evidence which the Intervenors desired to offer in opposition thereto. Witnesses for the Intervenors testified as to the effect of the Munzer-Herman plans on the R.O.T.C. program and on the exceptional children and model reading programs. The Director of Transportation stated that the Richmond County school system has 97 buses, including four assigned to special education. Eighty-three operate daily and there are 10 spare buses. In the last school year more than 12,000 students of a total of 34,619 were bussed. It was estimated that under the proposed plan 27 new buses would be required at a cost of $12,400 each with an annual operational cost of $5,000 per bus.[4] Under Plan III, 5,681 additional elementary students would be transported. On the secondary level, Plan I contemplates bussing of 1,664 additional high school and junior high students. Plan II (secondary) calls for the transportation of 2,150 more students than are now being bussed. The estimates of increased transportation

(fol. 8) needs are possibly overestimated by Dr. Munzer and Mr. Herman.

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4. The same objection as to cost of increased transportation was made in the Savannah case. With staggered bus schedules, the increased needs have been handled (though with difficulty) by the existing equipment. The Chatham County system has approximately the same number of buses as Richmond County and about the same enrollment.

Counsel requested the Court to delay implementation of any plan pending discussions among the parties as to devising one (particularly on the secondary school level) which would be satisfactory. I granted a twenty-day extension for the purpose. That period has passed without any agreement being reached. Of course, in any event, the parties would not be permitted to stipulate away the mandate of the Consittution as to establishment of a unitary school system - one in which there are neither white nor black schools, just schools.

On July 1, 1971, the Fifth Circuit ordered that this Court require the Richmond County School Board "forthwith" to constitute and implement a constitutional student assignment plan. That means now, at once, without delay or interval. Because of the Board's wilful failure to carry out its constitutional duty the mandate of the higher Court could not be complied with. To obviate the system being closed down indefinitely I permitted the carrying on of a dual system at the beginning of the year. It is still in effect.

Last June I handed down an Order which fully integrated the secondary schools in the Chatham County system (with one necessary exception). I delayed action on the elementary level as the Board wished more time and had not been able to agree on a plan. My decision was appealed and the ruling reversed. This Court was instructed to "forthwith" desegregate the elementary as well as secondary schools. This was done by the Court early in September, 1971. The situation

in the Chatham County school case differs only from the Richmond County case in that the former involved the beginning of a school year and the latter the middle of such a year.

I realize that February is a poor time to revolutionize a school system. Significant educational problems are especially involved in massive changes in student populations of senior high schools during the academic year. Student schedules have already been planned for the year. Athletic programs have been developed and implemented. Seniors have spent one half of the year in present locations and have planned senior year activities, including ordering rings and yearbooks.

But a start must be and will be made. It will commence with certain elementary schools and will be effectuated in three phases. Phase One of Plan III proposed by the Court's experts will be implemented not later than February 15, 1972. The initial implementation will apply to two clusters of elementary schools represented by Zone A (Telfair, Evans, Milledge and Houghton) and by Zone D (White, Wilkerson Gardens and Bungalow Road elementary schools). I will comment subsequently on the closing of Houghton elementary.

(fol. 9) Phase Two will be implemented on or before March 15, 1972. This Phase involves Zones E and I under Plan III. The elementary schools affected are Jenkins and Fleming which will be paired and Griggs and Southside which will likewise be paired on or before March 15th next.

Plan III as related to other elementary schools in the system will be implemented on September 1, 1972.

Below is reviewed the effect of Plan III on the elementary schools with special relation to pupil population and available classroom space.

PHASE ONE, PLAN III

ELEMENTARY SCHOOLS

Zone A

At the evidentiary hearing on December 16, 1971, objections were raised by the Intervenors to the closing of Houghton elementary as proposed in each of the four elementary plans involving Zone A. Opponents thereof did not believe that the three other elementary schools in the Zone (Evans, Telfair and Milledge) would be capable of housing both regular classes and the special education classes, particularly the special education pupils at Evans.

An analysis of pupil population and available space in Zone A is set out below. It indicates that there is adequate space at Telfair, Evans and Milledge for all pupils, including special education children.

	Pupils per Plan	Grade	Class Room Needs	Special Ed. for 1971
Telfair	431	6-7	17	31-2
Evans	433	4-5	17	72-11
Milledge	658	1-3	26	0-0

	Rms. Needed Plan and Sp. Ed. '71	Rooms Available	Rooms +/-
Telfair	19	19	0
Evans	28	23	-5
Milledge	26	31	+5
	73	73	

As appears in the above table, there is a shortage of classrooms at Evans Elementary should no special education children be moved from that school. There are at least two solutions to this problem. Solution one would require the movement of five special education classes from Evans to Milledge. Solution two would call for movement of the fourth grade from Evans to Milledge, that is to say, the fourth grade as presented in the Munzer-Herman Plan III.

(fol. 10)

With respect to solution one, no change from Plan III as originally presented is required other than the movement of the special education children as referred to above.

Under the second solution, the following attendance results would obtain:

Telfair

Same as in original Plan

Milledge

Grades	W	B
1	153	91
2	154	91
3	102	67
4	121	100
	530	349
Total		879
Percentage of Blacks		38.5%

Evans

Grade	W	B
5	126	86
Total		212
Percentage of Blacks		40.6%

The Court leaves to the Board of Education (or Superintendent) the matter of determining whether Houghton Elementary should or should not be closed. If it is closed (and the evidence satisfies the Court that it is substandard) solution one which involves no change from the Plan as originally presented as related to

standard classrooms and grades seems preferable. If it should be determined not to close Houghton and if it should be included in Zone A along with Telfair, Evans and Milledge, the following distribution of pupils is indicated by the Plan:

Telfair

Grade	W	B
6	124	99
7	121	87
	245	186
Total		431
Percentage of Blacks		43.1%

Evans

Grade	W	B
3	102	67
Total		169
Percentage of Blacks		39.5%

Houghton

Grade	W	B
4	121	100
5	126	86
	247	186
Total		433
Percentage of Blacks		43.0%

Milledge		
Grade	W	B
1	153	91
2	154	91
	307	182
Total		489
Percentage of Blacks		37.2%

(fol. 11)

	Telfair		Evans	
	Teachers	Children	Teachers	Children
Sp.Ed.	2	14	6	6
Rooms Avail.		19		23
Rooms Needed		19		18

	Houghton		Milledge	
	Teachers	Children	Teachers	Children
Sp.Ed.	0	0	0	0
Rooms Avail.		22		31
Rooms Needed		17		20

Zone A presents no serious transportation problem. The distances are not great between the clustered schools.

Zone D

Under Plan III, Zone D, White, Wilkinson Gardens and Bungalow Road elementary schools are clustered. The Zone embraces a rather small geographical area and transportation distances are relatively short. There is no indication of space problems resulting from special education pupils.

The plan proposed for clustering of these three elementary schools in Zone D is adopted and will be implemented at the same time as Zone A, that is, on or before February 14, 1972. The pupil population in the four schools in Zone D as related to available space will be approximately as is shown in the original plan. It is illustrated in the table below:

	Pupils per Plan	Grades	Class Room Needs	Sp.Ed.'71 Children/ Teachers
White	785	5-6	31	0-1
Wilkinson Gardens	576	1-2	23	0-1
Bungalow Road	579	3-4	23	16-1

	Rms.Needed Plan and Sp.Ed.'71	Rooms Avail.	Rooms* + or -
White	31**	31	0
Wilkinson Gardens	23**	24	+1
Bungalow Road	24	29	+5
	78	84	

(fol. 12) PHASE TWO, ELEMENTARY

Zone E

Phase Two of the implementation of Plan III is approved and adopted and will be implemented not later than March 15, 1972. This Phase relates to Zone E and Zone I.

Zone E is made up of Jenkins and Fleming elementary which will be paired. No problem exists in respect to special education pupils.

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* The last column shows the number of rooms in excess (+) if Plan III is implemented and if the special education population as of the Fall of 1971 does not move. The minus sign indicates the room shortage.

** I assume that no classroom is needed since no grouping of special education children is indicated for these schools.

An analysis of pupil population and available pupil space in the pairing of Jenkins and Fleming appears below:

	Pupils per Plan	Grade	Class Room Needs	Sp. Ed. for '71 Ch/Tchr.
Jenkins	332	1-3	13	15-2
Fleming	320	4-7	13	22-2

	Rms.Needed Plan and Sp.Ed.'71	Rooms Avail.	Rooms + or -
Jenkins	15	15	0
Fleming	15	32	+17

Zone I

Zone I involves the pairing of Griggs and Southside Elementary schools. The transportation problem presents greater distances than Zones A, D or E. Griggs and Southside are located approximately 4.2 miles straight line distance from each other. The analysis of pupil population and available space indicates the following with respect to this Zone:

	Pupils per Plan	Grade	Class Room Needs	Sp. Ed. for '71 Ch/Tchr.
Griggs	463	5-6	18	17-2
Southside	650	1-4	26	0-0

	Rms. Needed Plan and Sp. Ed. '71	Rooms Avail.	Rooms + or -
Griggs	20	21	+1
Southside	26	15	-11

As indicated by the above table, there is a shortage of eleven rooms at Southside. The school district data furnished by the Superintendent's office shows that Southside has fifteen rooms. This would give it a capacity of 375 pupils on the basis of 25 pupils per classroom. However, it is noted that at the present time the school has an enrollment of 675. It follows that there must be more than fifteen classrooms at Southside elementary. Plan III, Zone I, indicates a school population of 650 at Southside which is smaller than the present enrollment figure.

(fol. 13)

PHASE THREE, ELEMENTARY

The third and final phase of desegregation of the elementary schools in Richmond County involves Zones B, C, F, G, H and the Alternative Zone outlined on page 45 of the original plan of desegregation. Phase Three will be fully implemented on September 1, 1972. I have deferred the desegregation of the schools in these zones until the beginning of the next school year and in doing so have taken into consideration the fact that the transposition from a dual system to a unitary system will involve adjustments

of a major character and that it is impractical and unwise to convert the system overnight at mid-year.

Zones B, C and F in Plan Three present no space or special education problems. An analysis of pupil population and space availability in regard to the four Zones in question shows as follows:

Zone B

	Pupils per Plan	Grade	Class Room Needs	Sp.Ed.'71 Children/ Teachers
Walker	932	5-7	38	43-3
Lamar	411	1-3	16	10-1
Monte Sano	544	3-4	22	0-0
Lake F.Dr.	267	1-2	11	0-0

	Rms. Needed Plan and Sp. Ed. '71	Rooms Avail.	Rooms + or -
Walker	41	43	+2
Lamar	17	23	+6
Monte Sano	22	23	+1
Lake F.Dr.	11	13	+2

Zone C

	Pupils per Plan	Grade	Class Room Needs	Sp.Ed.'71 Children/ Teachers
Collins	951	5-7	38	19-2
Bayvale	684	1-3	27	0-0
Copeland	554	3-4	22	0-0

	Rms. Needed Plan and Sp. Ed. '71	Rooms Avail.	Rooms + or -
Collins	40	41	+1
Bayvale	27	29	+2
Copeland	22	23	+1

(fol. 14)

Zone F

	Pupils per Plan	Grade	Class Room Needs	Sp.Ed.'71 Children/ Teachers
Craig	506	1-3	20	0-0
Hains	692	4-7	28	0-0

	Rms. Needed Plan and Sp. Ed. '71	Rooms Avail.	Rooms + or -
Craig	20	20	0
Hains	28	30	+2

Zone G

Zone G, Plan III, clusters Weed, Robinson and Merry elementary schools. An analysis of pupil population and available space in Zone G shows:

	Pupils per Plan	Grade	Class Room Needs	Sp.Ed.'71 Children/ Teachers
Weed	143	5	6	0-0
Robinson	294	6-7	18	40-4
Merry	523	1-4	21	0-0

	Rms. Needed Plan and Sp. Ed. '71	Rooms Avail.	Rooms + or -
Weed	6	12	+6
Robinson	22	16	-6
Merry	21	22	+1

No space or special education problems are involved in Zone G. A problem does exist which grows out of the need of six additional classrooms for special educational pupils at Robinson. Acceptable solutions include the following:

(1) Move 6 classes for special education to Weed Elementary School or

(2) Move Grade 6 to Weed Elementary School.

The Board of Education may adopt one or the other of these solutions.

Zone H

Zone H clusters Floyd, Garrett and National Hills elementary schools. Pupil population and available space analysis indicates the following as to Zone H:

	Pupils per Plan	Grade	Class Room Needs	Sp.Ed.'71 Children/ Teachers
Floyd	309	6-7	12	0-0
Garrett	466	3-5	19	20-3
National Hills	305	1-2	12	0-0

	Rms. Needed Plan and Sp. Ed. '71	Rooms Avail.	Rooms + or -
Floyd	12	23	+11
Garrett	22	20	-2
National Hills	12	14	+2

(fol. 15) There is an indicated shortage of two classrooms at Garrett. Solutions for this problem include:

(1) The shifting of two special - education classes to Floyd Elementary School or to National Hills.

(2) The shifting of Grade 5 from Garrett to Floyd Elementary School.

The Board of Educationmay adopt one or the other of these possible solutions.

ALTERNATIVE PLAN

(See pages 45 and 46 of original Munzer-Herman Plan)

The Alternative Plan includes Glenn Hills, Terrace Manor and Wheeless Road schools. The percentages of black pupils in Glenn Hills and Terrace Manor are high, averaging 48.1 per cent in the two schools. If these schools should be combined with Wheeless Road School which is predominantly white, the average percentage of black pupils would be 34.2. There is presently a total enrollment of 1,684 pupils in the three schools and a capacity of 1,650 according to schools data. Consequently, there is a need for two additional classrooms which, logically, would accommodate a class at Glenn Hill School and a class at Wheeless Road School.

The result of combining Glenn Hills, Terrace Manor and Wheeless Road schools according to an analysis of pupil population and available space is shown below:

	Pupils per Plan	Grade	Class Room Needs	Sp.Ed.'71 Children/ Teachers
Terrace Manor	508	1-2	20	0-1
Glenn Hills	340	3-4	13	0-0
Wheeless Road	836	4-7	33	0-1

	Rms. Needed Plan and Sp. Ed. '71	Rooms Avail.	Rooms + or -
Terrace Manor	20	21	+1
Glenn Hills	14	13	-1
Wheeless Road	33	32	-1

SECONDARY SCHOOLS

The desegregation of the secondary school system in Richmond County presents the same difficulties that is experienced in any large urban school district. the problems stem not only from vestiges of State-imposed segregation but from the practice since 1954 of school boards perpetuating dual systems by building schools designed to draw either from the white or the black school population, not from both. New schools have been erected with resulting preservation of a segregated system. By and large, the Negro schools lie in the heart of a densely populated black area of Augusta. White schools follow residential patterns. Lack of new and more strategically located middle grade schools compound the problem.

(fol. 16)

Irrespective of obstacles, the Fourteenth Amendment, as construed by federal courts, demands that the dual system now in existence be "wiped out root and branch" and "not tomorrow but now." However, you cannot in one day chop down

and dig up the stump of a tree which rooted two centuries ago. Desegregation will be delayed on the secondary level until September 1, 1972. [5] It must be fully accomplished by that date and will be. As I stated on another occasion, it is phantasy approaching autism to think that the Constitution of the United States treats Augusta differently from other places where a dual system is the result of de jure school segregation. Richmond County is no different from 42 other school districts in the Southern District of Georgia in which desegregation is now an accomplished fact; admittedly with travail in certain cases.

Earlier in this Order, I referred to some of the difficulties of mid-year desegregation, particularly high schools. At this time and during the current school year it would be chaotic, if not impossible to implement any major plan in respect to desegregation of secondary schools in Richmond County. More than that, there is at present no plan before the Court upon which it can act. Dr. Munzer and Mr.Herman presented two alternative plans for desegregation of secondary schools but at the hearing on December 16th last the possibility was raised that there might be discrimination against the plaintiffs in that Josey and Laney High Schools, which are all-black or practically so, would no longer be graduating schools whereas none of the predominantly white senior high schools have been thus

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5. Of course, in event of appeal and reversal of this Order the Board must be prepared to desegregate all schools during this year.

treated in the plans. I have asked that the experts suggest alternative plans as to the secondary schools in the Richmond County system dealing with that problem.

(fol. 17) O R D E R

(1) It is ordered and decreed that the desegregation of the elementary schools in the Richmond County system shall be in accordance with this Order. Defendants are directed promptly to take all necessary steps to the end that Plan III shall be implemented in the three phases described in this Order. No stay will be granted pending any appeal by any party from this Order.

(2) Responsibility as to implementation will be and is imposed upon the Board and the Superintendent of Schools and they are ordered to fully and timely implement Plan III for the elementary schools. If the Board does not act promptly in any case in which any discretionary authority is conferred upon it by this Order, the discretion in that respect will be exercised by the Superintendent and he is directed in any such instance to act and full responsibility is imposed upon him.

(3) Minor adjustments in the Plan may be made by defendants as to alternate assignments in the instance of special education classes provided that the desegregation levels outlined in the plans are maintained.

(4) The Superintendent of Schools shall file a report in writing with this Court on January 19, 1972, detailing

what has been done by him and by the defendant Board since this Order was signed in preparing, planning and carrying out the implementation of Phase One and Phase Two of Plan III. Similar written reports shall be filed by him at the end of each successive three-day period after such date until further order of this Court.

(5) Meanwhile, the Court will continue to consider and to endeavor to formulate and develop a feasible and sound plan of desegregation for the secondary schools in the system. At the earliest practicable time an Order in that respect will be entered. The secondary school plan approved and ordered by the Court will be implemented by defendants on September 1, 1972.

(6) The defendant Board and the Superintendent will file in this Court within 15 days a report showing the total enrollment during the present school year in every school in the system and the number of blacks and whites in each such school. The report will also include information as to racial composition of faculty and staff in the schools.

(fol. 18) (7) It is further ordered that the Board shall immediately review existing staff and faculty racial ratios and shall forthwith comply, on a system-wide basis, with the provisions for "Desegregation of Faculty and Other Staff" as set forth in Singleton v. Jackson Municipal Separate School District, et al., 419 F.2d 1211 (5 Cir.). The

School Board is directed to file semi-annual reports during each school year similar to those required in United States v. Hinds County School Board (5 Cir.), 433 F.2d 611, 618.

(8) The pending motions filed by the plaintiffs for appointment of a receiver for the Richmond County system and for adjudging the defendants in contempt will be held in abeyance, at least for the present.

(9) The evidence at the hearing on December 16, 1971, indicates that there are numerous instances where pupils are attending schools in zones outside their actual residence. The Board, Superintendent and school officials are ordered promptly to undertake corrective measures in respect to boundary observance. A report in that respect shall be furnished not later than February 1, 1972.

(10) The motion for award of attorney's fees to plaintiff's counsel is granted. The amount of the fee will be settled on affidavits or, if necessary, following a hearing on the subject.

(11) The defendant Board will, as a part of the costs in the case, pay the compensation and expenses of Messrs. Munzer and Herman for their services to this Court and same are assessed as costs against defendants.

This 13th day of January, 1972.

ALEXANDER A. LAWRENCE
CHIEF JUDGE, UNITED STATES
DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

APPENDIX B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-1211

ROBERT L. ACREE, ET AL.,
Plaintiffs-Appellants-
Cross Appellees,

versus

COUNTY BOARD OF EDUCATION OF
RICHMOND COUNTY, GEORGIA, ET AL.,
Defendants-Appellees-
Cross-Appellants,

versus

ANN GUNTER DRUMMOND, ET AL.,
Intervenors-Appellees-
Cross Appellants.

Appeals from the United States District Court for the Southern District of Georgia

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(March 31, 1972)

Before BROWN, Chief Judge, MORGAN and INGRAHAM, Circuit Judges.

BY THE COURT: These are appeals from the order of the district court dated January 13, 1972, directing implementation of a desegregation plan for the schools of Richmond County, Georgia. The history of this case is well documented by the district court. *Acree, et al v. Drummond, et al v. County Board of Education of Richmond County, Georgia, et al*, ___ F. Supp. ___ (S.D., Ga., January 13, 1972).

The County Board of Education and Intervenors raise numerous objections to the desegregation plan being implemented by the district court, most of which do not even merit discussion. The major contention is that the district court erred in requiring "forced bussing" to achieve racial balance, in violation of the equal protection clause of the Fourteenth Amendment and of Title IV of the Civil Rights Act of 1964.[1]

In *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), the Court made quite clear that bussing is an available tool for use by district courts in achieving school desegregation. In the instant case the district court utilized this tool along with the pairing, clustering and zoning methods long authorized by the Supreme Court and this court. *Swann v. Charlotte-Mecklenburg Board of Education, supra; Davis v. Board of School Commissioners of Mobile County*, 402 U.S. 33 (1971); *Boykins v. Fairfield Board of Education*, ___ F.2d ___ (5th Cir., 1972) [No. 71-3028, Feb. 23, 1972]; *Singleton v. Jackson Municipal Separate School District*, 432 F.2d 927 (5th Cir., 1970).

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[1] 42 U.S.C. § 2000c.

The argument that the equity powers of federal district courts have been limited by Title IV of the Civil Rights Act of 1964 has been rejected in *Swann*, where the Court found no intent on the part of Congress to restrict the powers of federal courts to enforce the equal protection clause or "to withdraw from courts their historic equitable remedial powers." 402 U.S. at 17.

The board and intervenors contend, however, that the district court's order irreparably harms "quality education" in Richmond County. The district court should not, and did not, permit the use of such platitudes to perpetuate a dual school system, nor could it permit defendants to rely on the inferiority of certain school facilities to which children were to be transferred as a justification for continued racial discrimination. The Court in *Swann* stated unequivocally:

> "In default by the school authorities of their obligation to proffer acceptable remedies, a district court has broad power to fashion a remedy that will assure a unitary school system. 402 U.S. at 16."

The Richmond County Board of Education has operated and continues to operate a *de jure* as well as a *de facto* segregated system, and has long been under order to desegregate. *See Acree v. County Board of Education of Richmond County, Ga.*, 399 F.2d 151 (5th Cir., 1968). Despite a clear duty, the board has offered no viable constitutional alternative to the plan implemented by the court below, but instead has engaged

in conduct only designed to disrupt and delay the disestablishment of a dual system.

From our review of the plan adopted by the district court and the evidence presented, we are of the firm view that there is no indication whatsoever that the transportation required as a result of the court's plan would adversely affect the health of the children or impinge on the educational process. We are also convinced that a *good faith* effort by the school board will overcome any logistical problems that might arise.

The issues raised by plaintiffs have been dealt with by our prior order of February 8, 1972, in which we required the district court to consider plaintiffs' alternate plan along with those submitted by the court's experts in the development of a unitary system for the secondary schools of Richmond County.

We too recognize the practical problems which forced the district court to delay implementation of a plan for the secondary schools, and there are now little more than two months remaining in the school year. However, in view of the serious delays which have occurred in this case over past years, we order that a plan be developed immediately for the secondary schools, that some demonstrable progress be made now[2] and that a schedule be adopted forthwith in order that a constitutional plan will be implemented at the beginning of the 1972-73 school year.

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[2]For example, transportation facilities needed as a result of the plan should be arranged, funds applied for, budget changes contemplated, etc.

The district court is required to take whatever steps are necessary under its equity powers to assure compliance and cooperation from the school board in implementing a plan for the secondary schools and in carrying out the three phases of its desegregation plan for the elementary schools of Richmond County.[3]

The order of the district court of January 13, 1972 is AFFIRMED as modified herein.

The mandate shall issue forthwith.

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[3]The effect of the district court's plan, of course, is not to be ameliorated by such practices as segregation by race in the classroom. If the court receives evidence of such behavior, it should take further steps to enforce its decree. *See Moses v. Washington Parish School Board*, ——— F.2d ——— (5th Cir., 1972) [No. 71-2561, March 8, 1972].

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 72-1211

ROBERT L. ACREE, ET AL.,
Plaintiffs-Appellants-
Cross Appellees,

versus

COUNTY BOARD OF EDUCATION OF RICHMOND COUNTY, GEORGIA, ET AL.,
Defendants-Appellees-
Cross Appellants,

versus

ANN GUNTER DRUMMOND, ET AL.,
Intervenors-Appellees-
Cross Appellants.

Appeal from the United States District Court for the Southern District of Georgia.

(April 18, 1972)

Before BROWN, Chief Judge, MORGAN and INGRAHAM, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the petition for rehearing and motion for a more definite ruling filed by the County Board of Education of Richmond County, Georgia, in the above cause is hereby denied.

Filed April 18, 1972

EDWARD W. WADSWORTH,
Clerk

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SEP 18 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-79

COUNTY BOARD OF EDUCATION OF RICHMOND COUNTY, GEORGIA, *et al.*,

Petitioners,

VS.

ROBERT L. ACREE, *et al.*

No. 72-167

ANN GUNTER DRUMMOND, *et al.*,

Petitioners,

VS.

ROBERT L. ACREE, *et al.*

PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

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INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statement	2
Reasons Why the Writs Should Be Denied	3
Conclusion	6
Appendix A	1a

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-79

COUNTY BOARD OF EDUCATION OF RICHMOND COUNTY, GEORGIA, *et al.*,

Petitioners,

vs.

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No. 72-167

ANN GUNTER DRUMMOND, *et al.*,

Petitioners,

vs.

ROBERT L. ACREE, *et al.*

PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

Opinions Below

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 458 F.2d 486 and the opinion of the United States District Court for the Southern District of Georgia at 336 F. Supp. 1275.

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Questions Presented

These two petitions for writs of certiorari to review the same judgment of the United States Court of Appeals for the Fifth Circuit, one filed by the school authorities of Richmond County, Georgia and one filed by a group of white parents who intervened in this school desegregation action which had been pending since 1964, each present basically the same claim: that the order of the district court, as affirmed by the Court of Appeals, directing implementation of a pupil desegregation plan of which transportation was an integral part is unauthorized by the principles elucidated in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971) because (a) the plan is projected to achieve at each elementary school a student body of racial composition so nearly identical as to merit description as a "racial balance" plan; and (b) the time, distance and expense of the transportation which would be required to implement the order is so great as to be beyond the sort of plans contemplated by this Court in *Swann*. The petition in No. 72-167 also raises certain questions with respect to a recently enacted statute which have never been presented to any court in the context of this case and which, in any event, have no bearing upon this case.

Statement

We shall not belabor the facts by adding materially to the already lengthy statements set out in the Petitions; the clearest and most cogent description of the history of this

school desegregation case is to be found in the district court's order, reprinted at pages A-7 through A-32 of the Appendix to the Petition in No. 72-167.

After this Court's decision in *Swann, supra*, a pending appeal in the United States Court of Appeals for the Fifth Circuit was remanded to the district court with instructions "forthwith to constitute and implement a student and faculty assignment plan that complies with the principles established in *Swann* v. *Charlotte-Mecklenburg Board of Education . . .*" *Acree* v. *County Board of Education*, 443 F.2d 1360. At that time, the public schools of Richmond County, Georgia operated upon a strict geographic zoning student attendance plan, under which traditionally black and white schools retained their racial identities. (See 336 F. Supp. at 1277-78, Appendix to Petition in No. 72-167, pp. A-12 through A-13). Following a series of conferences, hearings, and opportunities afforded respondents to prepare and propose a desegregation plan for the Richmond County schools which would meet constitutional standards, (none of which were acted upon), the district court (pursuant to the authority confirmed by *Swann*) appointed its own experts to suggest alternative desegregation plans, and approved one of such plans for implementation on a phased basis, with complete implementation to occur effective with the commencement of the 1972-73 school year.

All parties appealed and on March 31, 1972 the judgment of which review is sought, affirming the district court order with a modification only as to timing, was entered.

Reasons Why the Writs Should Be Denied

These petitions do little more than simply ask this Court to overrule its decision in *Swann* because once again a school board and some of its white patrons do not desire effective desegregation of the public schools. The vaunted

"racial balance" supposedly to be achieved by implementation of the district court's order is hardly the "wooden resort to racial quotas" which this Court held in *Swann* was not required to remedy the denial of Fourteenth Amendment rights. See *Drummond* v. *Acree*, No. A-250 (September 1, 1972) (Mr. Justice Powell, Circuit Justice), page 3.

Both Petitions list the overall population ratios of the various zones within which individual schools are paired (Petition in No. 72-79, pp. 9 and 10; Petition in No. 72-167, p. 10) rather than demonstrating the variation between the populations of each school. These are shown in the projections submitted by the court-designated experts (reprinted at pp. A-39 through A-54 of the Appendix to the Petition in No. 72-167). The individual schools are projected to range from 28.7% black (p. A-48) to 50% black (p. A-42). While this range is not quite so large as that in Charlotte, it is Petitioners, and not the plaintiffs or either of the Courts below, who are here exaggerating numbers far beyond their significance.

Whatever one's view of the range in racial breakdowns among schools from 28 to 50%, the plan ordered implemented by the district court was not designed to come as close to the system-wide ratio in Richmond County as possible. In fact, it was not prepared from data listing the race, residence and grade level of every student in the system (which would have permitted its draftsmen to design zones for individual or paired schools so as to bring about a far closer tolerance among the various schools) but was based simply upon combining the previously existing zones for each school, which had been drawn by the county school authorities, and altering their grade structures through contiguous and non-contiguous pairing and clustering, in accordance with their capacities and the need to bring about some real desegregation.

Frankly, it is difficult to understand the exaggerated claims in both Petitions that this is a racial balance plan. The explicit holdings to the contrary by both courts below are clearly correct; the mandates of this Court in *Swann* received only respectful application by a district court operating under great pressure and without cooperative assistance from the school authorities,[1] and a Court of Appeals intimately familiar with the issues in school desegregation cases.

In a similar vein, the Petitions are filled with claims that the transportation of school children required under this plan is far greater in distance, time and expense than that approved by the Court in *Swann*. Curiously there is not a single reference to any evidence concerning these matters in either Petition but merely the sort of *ad hoc* claim that a round trip of 11.8 miles in Richmond County will take two hours a day (Petition in No. 72-79, p. 8). There may be some practical problems in implementing the desegregation plans, but not only will "a good faith effort by the school board . . . overcome any logistical problems that might arise," 458 F.2d at 488, but neither the decree of the district court nor the judgment of the Court of Appeals in any way restricts the parties from seeking modifications should insuperable, practical difficulties arise when the plan is actually implemented. See *Kelley* v. *Metropolitan County Board of Education*, No. 71-1778 (6th Cir., May 30, 1972) at pp. 22-25 (reprinted as Appendix A).[2]

In short, none of the Petitioners have raised significant claims of any substance to the effect that the lower courts exceeded the equitable remedial powers described in *Swann*,

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[1] Here, as in *Swann*, the exercise of remedial authority by the district court was prompted by the total default of school officials.

[2] Thus intervenors should present any "less rending" (Petition in No. 72-167, p. 16) but equally effective elementary school desegregation plan to the district court.

and only the overruling of that unanimous decision could justify altering the judgment below.

Finally, the Petitioners in No. 72-167 make some suggestions that Sections 805 and 806 of the Education Amendments of 1972, P.L. 92-138, somehow affect this litigation. As to Section 805, there is not a whisper of a suggestion in the Petition that the trial court employed any non-uniform rule of evidence in reaching its result; and with regard to Section 806, we are unable to fathom any suggestion in this Court's *Swann* decision that it would not apply its interpretation of 42 U.S.C. § 2000c-6 in any appropriate case no matter in what jurisdiction it arose. In any event, that section applies or does not apply to this case in exactly the same manner as it did in *Swann*.

CONCLUSION

For the foregoing reasons, respondents Acree, et al. respectfully pray that the writs of certiorari be denied.

Respectfully submitted,

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Appendix A to Brief in Opposition to Certiorari

Nos. 71-1778-79

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ROBERT W. KELLEY, ET AL.,
HENRY C. MAXWELL, JR., ET AL.,

Plaintiffs-Appellees,

v.

METROPOLITAN COUNTY BOARD OF EDUCATION OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, C. R. DORRIER, Chairman, *et al.*,

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

Decided and Filed May 30, 1972

Before:

EDWARDS, CELEBREZZE and McCREE,

Circuit Judges.

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III PRACTICAL PROBLEMS

If there is an appellate issue of substance in this appeal, it is to be found in the practical problems which appellants

claim have developed since the entry of the District Judge's order. Appellant summarizes these issues thus:

> A plan which exposes the children in the school system to undue danger to health and accident, interferes with their education by requiring excessive periods of time on buses, causes them to leave home before daylight or to return home after dark, exposes them to the dangers of travel in old and inadequately maintained equipment and causes elementary school children, both black and white, to suffer hardships to which young children should not be exposed can hardly be termed feasible, workable, effective and realistic.

Substantial as these problems appear to be on the surface, there are two reasons why no relief can be granted in this forum. The first is that no motion for relief pertaining to these facts has ever been filed by appellant in the District Court. These statements at this point are allegations and they are controverted by the appellee. This, of course, is an appellate court—not a trial court. As appellants well know, the arena for fact-finding in the federal courts is the United States District Court. Until these claims have been presented in a trial court, with an opportunity for sworn testimony to be taken and controverted issues and facts decided by the processes of adversary hearing, this court has no jurisdiction.[2]

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[2] During the pendency of an appeal, jurisdiction of the case lies, of course, in the appellate court. There is, however, familiar law to deal with an unexpected problem which arises in this period concerning the actual terms of the order or judgment under appeal. The District Court may on being apprised of the problem and having determined its substantiality (with or without hearing) certify to the appellate court the desirability of a remand for completion or augmentation of the appellate record. No memory in this court encompasses a refusal of such a request.

The record is clear that no request for remand was made by the District Court, obviously, at least in part, because appellants made no motion for relief before the District Court.

The second reason as to why appellants are entitled to no relief on this issue probably serves to explain the first. The entire "record" upon which appellant bases his plea for relief as to practical problems is a "Report to the Court" of Dr. Brooks, Director of Schools of the Metropolitan County Board of Education. This report is dated October 18, 1971, just over a month after the opening of school. While we are advised that it was sent to the District Judge, as we have noted, no motion of any kind seeking any District Court action was ever filed concerning it. Even more important, the statement on its face suggests that local authorities in Nashville and Davidson County have not made good faith efforts to comply with the order of the District Judge.

Dr. Brooks' affidavit does present this exculpatory explanation which serves to point in the direction of other authorities as those responsible for the inconveniences and hazards of which Dr. Brooks' statement speaks. The statement says:

> The School Board is fiscally dependent in that its budgets must be approved by the Metropolitan City Council. In approving the budget of the School Board on June 30, 1971, Council members demanded assurance that no funds included in the budget would be used to purchase buses for the purpose of transporting students to establish a racial balance. The 1971-72 budget did provide for the purchase of 18 large buses to replace obsolete equipment to provide transportation for students to the new comprehensive McGavock High School.

It is clear, however, that neither the Metropolitan City Council or, for that matter, the Legislature of Tennessee can forbid the implementation of a court mandate based upon the United States Constitution. In a companion case to *Swann, supra,* Chief Justice Burger, writing again for

a unanimous court, held that an anti-busing law which flatly forbids assignment of any student on account of race or for the purpose of creating a racial balance or ratio in the schools and which prohibits busing for such purposes was invalid as preventing implementation of desegregation plans required by the Fourteenth Amendment. *North Carolina State Board of Education* v. *Swann*, 402 U.S. 43, 45-46 (1971). *See also Cooper* v. *Aaron*, 358 U.S. 1 (1958).

Dr. Brooks' statement also furnishes the bus schedule of the Metropolitan County Board of Education by yearly models. It shows that the Board has an average of 18.9 buses for each of the last 10 model years. The 18 buses purchased in 1971 were described by Dr. Brooks as "to replace obsolete equipment." It appears from the Metropolitan Board's own statements that the Board and the local authorities in Nashville did not purchase one piece of transportation equipment for the purpose of converting the Metropolitan County Board of Education school system from a dual school system segregated by race into a unitary one, as called for by the District Judge's order.

At court hearing we had been puzzled as to why counsel for the Board had failed to go back to the District Court to report on the grievous circumstances which he so strongly alleged before us. Like most decrees in equity, an injunctive decree in a school segregation case is always subject to modification on the basis of changed circumstances. *Sloan* v. *Tenth School District of Wilson County*, 433 F.2d 587, 589-90 (6th Cir. 1970). Further acquaintance with the record, which, of course, the District Judge would have known in detail, leaves us in no further quandry as to the reasons for counsel's reluctance.

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